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## MDSA RESOURCES SDN BHD v. ADRIAN SIA KOON LENG

COURT OF APPEAL, PUTRAJAYA
AB KARIM AB JALIL JCA
ABU BAKAR JAIS JCA
AHMAD ZAIDI IBRAHIM JCA
B [CIVIL APPEAL NO: M-02(IM)(NCC)-380-02-2021]
10 JANUARY 2023

**Abstract** – *A scheme of arrangement is not workable when there is non-disclosure of materials needed, the proposed scheme is unreasonable and the composition of the scheme creditors is unfair. There is no reason to allow a company, that is saddled with enormous debts, to continue operating without a clear strategy to effectively manage its serious difficulties. It would only invite further woes to sanction a scheme of arrangement.*

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***COMPANY LAW:*** *Scheme of arrangement – Sanction and approval of court – Application for – Whether composition of scheme creditors fair – Whether composition fairly representative of class in question – Whether there was full disclosure of materials needed – Whether scheme of arrangement reasonable – Companies Act 2016, ss. 366, 368 & 369*

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MDSA Resources Sdn Bhd ('MRSB'), which was owned by Hatten MS Pte Ltd Singapore, was a company engaged in property development and related activities. MRSB was in financial distress and needed both time and arrangement to stave off its creditors who were entitled to recover their monies from MRSB. This could only be done if a meeting could be held between MRSB and its creditors. The High Court ordered such meeting and granted to MRSB a restraining order ('RO'). A meeting was held and the scheme of arrangement was agreed by 90.4% of the scheme creditors. The respondent, the purchaser of the property developed by MRSB and also a creditor, objected to the scheme of arrangement. MRSB applied for the High Court's sanction and approval for its scheme of arrangement, pursuant to ss. 366, 368 and 369 of the Companies Act 2016, and for the extension of the RO. The special purpose vehicle ('SPV') proposed in the scheme of arrangement, Resolve Resources Sdn Bhd ('RRSB'), applied to intervene but the application was dismissed. The applications by MRSB were refused by the High Court on the grounds that: (i) there was only one class of scheme of creditors for the scheme of arrangement, which comprised guaranteed rental return scheme ('GRRS') and/or liquidated ascertained damages ('LAD') creditors and trade creditors ('third party creditors'). The same class also comprised the Hatten Group Scheme Creditors ('HGS creditors'); (ii) the scheme of arrangement had lumped together the third party creditors

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and HGS creditors as scheme creditors. Together, they made up the 90.4% of the votes of the scheme of creditors supporting the scheme of arrangement; (iii) the grouping together was unfair, especially to the third party creditors; (iv) there were 1,636 third party creditors with the value of only RM98,104,585.17, while there were only 19 HGS creditors but with the combined value of RM276,084,693.78. The two totalled to RM374,189,278. In percentage, the third party creditors comprised only 26.2% while the HGS creditors constituted 73.8%. Hence, the present appeals by MRSB and RRSB. The issues that arose for adjudication were: (i) whether the composition of the scheme creditors was unfair; (ii) whether there was non-disclosure of material needed; and (iii) whether the scheme of arrangement was reasonable.

**Held (dismissing appeals)**
**Per Abu Bakar Jais JCA delivering the judgment of the court:**

**(1)** The HGS creditors were the dominant group but they were all related to MRSB as they comprised MRSB's ultimate holding company, holding company, subsidiaries, directors and related parties with common directors. The HGS creditors would obviously be in favour of the scheme of arrangement. The third party creditors, on the other hand, were not related to MRSB and they had disparate and distinct interests from HGS creditors. The third party creditors would obviously be keen to safeguard their interest, including preserving their right to recover maximum debts owed to them by MRSB compared to HGS creditors. The HGS creditors outnumbered the third party creditors whom, because of their relative number to the former, would not be able to cogently challenge the HGS creditors. The HGS creditors, because of their sheer number, would effectively and decisively be in the position to vote in favour of the scheme of arrangement. There was no doubt at all that the composition of the class of creditors, comprising the third party creditors and the HGS creditors to constitute a single class of the scheme creditors, was unfair, uneven and downright lop-sided. They should not have been lumped together in a single group. The composition of the scheme creditors could not be regarded as fairly representative of the class in question. (paras 48-51)

**(2)** MRSB must make a clear explanation to the third party creditors about the full effect of the arrangement. Explanation must also be given to show the difference, in effect, to the third party creditors as against the other creditors. However, there was insufficient explanation proffered by the appellant. MRSB had not been transparent about the circumstances giving rise to the related party debts. There was, therefore, a material non-disclosure of the information needed. (paras 56-58)

**(3)** The scheme of arrangement required RM167.4 million of debts to the scheme creditors by MRSB to be waived. However, there was no indication in the books of MRSB how this large amount was derived at. The scheme also required that MRSB shall be irrevocably, permanently, unconditionally, completely and absolutely released and discharged from all claims and liabilities to all the scheme creditors. The third party creditors, including the respondent, would be left in a bind if the proposals above were accepted. They could no longer claim their money in full from MRSB. Furthermore, the scheme of arrangement provided for the undertaking by MRSB to inject assets of RM64.2 million but there was no explanation how this huge amount would be raised. There was no reason to disagree with the findings of fact by the High Court that the sanction for the scheme of arrangement should not be given as the same was unreasonable, unfair and not equitable. (paras 59, 60 & 64)

**(4)** As the High Court did not err in refusing the sanction, there was no reason to disturb the High Court's decision in disallowing to extend the RO. The latter must be contingent upon the former. As the application for sanction was rightly dismissed, the RO could not be sustained and be allowed to continue. Likewise, there was absolutely no reason for the High Court to allow RRSB's application to intervene as the SPV, once the applications for sanction and approval of the scheme of arrangement were dismissed. (para 66)

**Case(s) referred to:**

*Dr Jayadevan Arayan & Anor v. Sharon Simon & Ors [2000] 3 CLJ 647 CA* ***(refd)***
*Mansion Properties Sdn Bhd v. Sham Chin Yen & Ors [2021] 1 CLJ 609 FC* ***(refd)***
*Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC* ***(refd)***
*Primus (Malaysia) Sdn Bhd v. Rin Kei Mei & Ors [2012] 1 CLJ 176 FC* ***(refd)***
*Re UDL Holdings Limited [2002] 1 HKC 172* ***(refd)***
*The Royal Bank of Scotland NV v. TT International Ltd [2021] 2 SLR 213* ***(refd)***

**Legislation referred to:**

Companies Act 2016, ss. 366(3)(d), 368, 369(1)(a)

**Other source(s) referred to:**

Aiman Nariman Mohd Sulaiman & Effendy Othman, *Malaysian Company Law: Principles and Practices,* 3rd edn, p 1075

*For the appellant - Lee Shih; M/s Lim Chee Wee Partnership*
*Nathalie Ker & Jaspal Singh Gill; M/s Sekar Gill & C Suren*
*For the respondent - Ho Yuk Yuen, Tan Kah Kiat, Nai Mei Kei & Bryan Boo Wei Xiang; M/s YY Ho & Lee*

*[Editor's note: Appeal from High Court, Malacca; Originating Summons No: MA-24NCC-3-07-2020 (affirmed).]*

*Reported by Najib Tamby*

## JUDGMENT

*Life is a series of natural and spontaneous changes. Don't resist them; that only creates sorrow. Let reality be reality. Let things flow naturally forward in whatever way they like – Laozi*

**Abu Bakar Jais JCA:**

### Introduction

**[1]** There are two appeals before this court. In the first appeal, 380-02-2021, the appellant, MDSA Resources Sdn Bhd ("MRSB") applied for the High Court's sanction and approval for its scheme of arrangement pursuant to ss. 366, 368 and 369 of the Companies Act 2016 ("CA") and also extension of the restraining order. The High Court ("HC") refused these two applications. In the second appeal, 379-02-2021, the appellant, Resolve Resources Sdn Bhd ("RSB") applied to intervene at the HC but this was also dismissed.

**[2]** Stripped off the legal jargon, at this stage for better and easier understanding, a little elaboration on the appeals above would be appropriate. MRSB is in colossal debts owed to its creditors. One of them is the respondent. MRSB proposed some terms to the creditors on how to settle these debts. MRSB wants the HC to give approval or sanction for this proposal. This proposal is better known as a scheme of arrangement. The respondent also objected to this proposal.

**[3]** This proposal means little, if not nothing if the creditors can still sue MRSB and take whatever court actions in respect of recovering the debts. Therefore, MRSB also wish that these actions continue to be restrained by the order of the HC. This is the application to extend the restraining order ("RO").

**[4]** Another application refused by the HC is the application by RSB to intervene in this case. RSB is the special purpose vehicle to assist the proposal to settle MRSB's debts. RSB wants to be a party at the HC. It wants to say its piece before the HC decides whether the sanction should be granted or not.

**[5]** Thus, before us are three matters. First, the refusal of the HC to sanction the scheme of arrangement. Second, is the refusal of the HC to extend the RO and third, the decision of the HC to dismiss the application to intervene by RSB. The first and second, relate to the first appeal and the third relates to the second appeal.

### Background Facts

**[6]** MRSB is owned by Hatten MS Pte Ltd Singapore. MRSB is a company engaged in property development and related activities. It is involved in the mixed development of a site in Bandar Hilir, Melaka. Four components for the development are Elements Mall, Hatten Place, Silverscape Residence and the hotel, Double Tree Hilton.

**[7]** MRSB which is in financial distress needed both, time and arrangement to stave off its creditors who are always entitled to recover their money from MRSB. That can be done if a meeting could be held between MRSB and its creditors, essentially to agree to some form of compromise or arrangement on the payment of the debts and for more time to be accorded to MRSB to honour its commitments.

**[8]** The intervener allowed by the HC in this case is the respondent, Adrian Sia Koon Leng who is a purchaser of the property developed by the MRSB, the appellant. He is also a creditor of MRSB as he had let that property he bought, back to MRSB for rental under a scheme known as "Guaranteed Rental Return Scheme" ("GRR"). He objects to any scheme of arrangement from MRSB. His main reason is because the scheme of arrangement lacks particulars.

**[9]** On 10 September 2020 the HC ordered the said meeting within two months and granted to MRSB the RO also for two months.

**[10]** Thereafter, the HC granted extension for the meeting to be held and also provided extension of the RO.

**[11]** Pursuant to the order made by the HC on 10 September 2020 for the meeting with regard to the scheme of arrangement by MRSB, the creditors were told that MRSB's debts owed to the creditors as at 29 June 2020 stood at whopping RM374 million. Also revealed was the fact MRSB suffered losses of RM50,222,509 for June 2019 and RM60,775,544 for June 2020.

**[12]** The scheme of arrangement proposed a total of debts amounting to RM167.4 be waived by the scheme creditors. The balance RM206.6 million will be transferred and vested in a special purpose vehicle ("SPV"), which is RSB.

**[13]** MRSB will be released and discharged from all claims and liabilities. Earmarked properties of approximate value of RM142.2 million will be transferred to RSB. The appellant will inject further assets up to RM64.4 million into RSB. The earmarked properties may be sold in three to five years. The proceeds will be channelled to the SPV to be distributed.

**[14]** The recovery rate of 70% of the debts for the scheme creditors was stated in the scheme. In comparison, there would be a recovery rate of only 44.9% if the MRSB is wound-up.

**[15]** There was to be a single class of unsecured scheme of creditors comprising GRR and/or LAD creditors and trade creditors collectively known as Third-Party Scheme Creditors (third-party creditors) and Hatten Group Creditors. The third-party creditors and Hatten Group Creditors were collectively known as the "scheme creditors".

**[16]** Secured lenders and essential service providers are excluded. The secured creditors included banks and other financial institutions. There was to be recognition of future GRR obligations/liabilities and better treatment to third-party creditors over the Hatten Group Creditors in terms of timing of settlement/payment and percentage of recovery. Unsold properties will be earmarked at a markdown of 25% from the list price. The earmarked properties are part of Elements Mall. RSB will be set-up for the transfer of the debts owed to the scheme creditors and for the sale of the earmarked properties.

**[17]** There was to be disposal of properties in RSB by independent party/liquidator over a period of time. The period is determined to be between three to five years.

**[18]** There was to be a termination of lease back agreements. GRR creditors are free then to use or rent out the properties.

**[19]** On 13 January 2021 the meeting was indeed held pursuant to HC's order made on 10 September 2020 as explained earlier. In the said meeting on 13 January 2021, the scheme of arrangement was agreed by 90.4% of the scheme creditors.

**[20]** Hence, thereafter MRSB requested the sanction and approval of the HC for the scheme of arrangement and this sanction as stated, was refused by the HC.

**Summary Of The HC's Findings And Decision**

**[21]** At the meeting on 13 January 2021 for the scheme creditors, the total value of the scheme creditors was RM313,962,670. The scheme creditors in value of RM283,882,044 or 90.4%, voted in support of the scheme of arrangement.

**[22]** There is only one class of scheme of creditors for this scheme of arrangement. This class comprised GRR and/or LAD creditors and trade creditors, who are collectively known as third-party creditors. This class also comprised Hatten Group Scheme Creditors ("HGS creditors"). Thus, what was done by MRSB for this scheme of arrangement is to lump together the third-party creditors and HGS Creditors as scheme creditors. Together, they made-up the 90.4% of the votes of the scheme of creditors supporting the scheme of arrangement.

**[23]** The HC found this grouping together of the third-party creditors and HGS creditors to become the scheme creditors as unfair, especially to the third-party creditors. This is because HGS creditors will of course support the MRSB's scheme of arrangement as HGS creditors and MRSB are in the same group, the Hatten Group.

**[24]** This finding of the HC is reinforced by the fact that there were 1,636 third-party creditors with the value of only RM98,104,585.17. While there were only 19 HGS creditors but with the combined value of RM276,084,693.78. The total of the two is RM374,189,278.95.

**[25]** In percentage, third-party creditors comprised only 26.2%, while HGS creditors constituted 73.8%.

**Summary Of The Appellant's Contention**

**[26]** Before us, MRSB as the appellant admitted the respondent is one of the scheme creditors. He is one of the GRR creditors holding a debt right of RM117,205.74 or 0.03% of total scheme debt owed against the appellant.

**[27]** All debts owed to the scheme creditors including the respondent will be transferred and held by a company or SPV which is RSB. Subsequently, RSB will be given "earmarked properties" to settle the debts of the scheme creditors. These properties can be sold off between three to five years to settle these debts. The scheme creditors can expect to be paid 70% of their debts through this arrangement.

**[28]** In the meeting on 13 January 2021, 90.4% of scheme creditors in value had agreed to the scheme of arrangement. Therefore, the HC should accept this and grant the sanction. Scheme creditors' view should prevail over the learned High Court Judge's ("HCJ") opinion.

**[29]** It is wrong for the learned HCJ to consider that it is unrealistic in the present economic condition that the "earmarked properties" can be sold off between three to five years to settle the debts of the scheme creditors.

**[30]** The scheme of arrangement would have been approved by an honest and intelligent person especially after being approved by 90.4% of the scheme creditors in value in the meeting on 13 January 2021.

**[31]** 70% recovery under the scheme is better for the scheme creditors rather than 44.9% recovery if MRSB is liquidated or wound-up.

**[32]** Third-party scheme creditors can be grouped together with HGS creditors in the same class to vote in the meeting because they have similar legal rights as unsecured creditors.

**[33]** There is no need for expertise to handle large amounts by RSB as it will be managed by liquidators from KPMG Deal Advisory Sdn Bhd who will also manage the sale of the "earmarked properties".

**Summary Of The Respondent's Contention**

**[34]** Even when the scheme of arrangement has the support of 75% in value of the scheme creditors, this does not mean the court has no duty to scrutinise the same and consider whether approval and sanction should be granted for the scheme of arrangement.

**[35]** The scheme of arrangement is unfair as the scheme creditors with divergent interests had been grouped together to vote for the scheme. The composition of the scheme creditors is also for the benefit of the dominant party.

**[36]** The scheme of arrangement did not consider the full costs that should be borne by the appellant.

**[37]** The right and interest of the respondent are not addressed sufficiently in the scheme of arrangement.

**[38]** The scheme of arrangement makes preferential treatment to parties related to the appellant at the expense of other creditors.

**Our Decision**

**[39]** First, there is no dispute by all parties regarding the utility of a scheme of arrangement proposed by a company under financial difficulties like MRSB. There are abundant case law authorities on this point. (Among others, see Federal Court cases of *Mansion Properties Sdn Bhd v. Sham Chin Yen & Ors* [2021] 1 CLJ 609; [2021] 1 MLJ 527 and *Primus (Malaysia) Sdn Bhd v. Rin Kei Mei & Ors* [2012] 1 CLJ 176).

**[40]** Second, compromise and arrangement for a company are basically provided by s. 366 of the CA. The full provision states as follows:

> Power of Court to order compromise or arrangement with creditors and members
>
> (1) The Court may, on an application under this Subdivision, order a meeting in a summary way to be summoned in such manner as the Court directs, by either:
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> (a) the company;
>
> (b) any creditor or member of the company;
>
> (c) the liquidator, if the company is being wound up; or
>
> (d) the judicial manager, if the company is under judicial management.
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> (2) A meeting held pursuant to an order of the Court made under subsection (1) may be adjourned if the resolution for adjournment is approved by seventy-five per centum of the total value of creditors or class of creditors or the members or class of members present and voting either in person or by proxy at the meeting.
>
> (3) The compromise or arrangement shall be binding on:
>
> (a) all the creditors or class of creditors;
>
> (b) the members or class of members;

A (c) the company; or

(d) the liquidator and contributories, if the company is being wound up, if the compromise or arrangement is agreed by a majority of seventy-five per centum of the total value of the creditors or class of creditors or members or class of members present and
B voting either in person or by proxy at the meeting or the adjourned meeting and has been approved by order of the Court.

(4) The Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as the Court thinks just.

C (5) An order under subsection (3) shall have no effect until an office copy of the order is lodged with the Registrar, and upon being so lodged, the order shall take effect on and from the date of lodgement or such earlier date as the Court may determine and as may be specified in the order.

D (6) Subject to subsection (7), a copy of every order made under subsection (3) shall be annexed to every copy of the constitution of the company issued after the order has been made, or in the case of a company not having a constitution, to every copy of the instrument issued constituting or defining the constitution of the company.

E (7) The Court may, by order, exempt a company from complying with the requirements of subsection (6) or determine the period during which the company shall comply with the requirements.

(8) If any such compromise or arrangement, whether or not for the purposes of or in connection with a scheme for the reconstruction
F of any company or the amalgamation of any two or more companies, has been proposed, the directors of the company shall:

(a) if a meeting of the members of the company by resolution directs, instruct such accountants or advocates or both as are named in the resolution to report on the proposals and forward
G their report to the directors as soon as practicable; and

(b) make the report available at the registered office of the company for inspection by the shareholders and creditors of the company at least seven days before the date of any meeting ordered by the Court to be summoned in accordance with subsection (1).

H (9) The company and every officer who contravene subsection (6) or (8) commit an offence.

**[41]** In addition, the authors, Aiman Nariman Mohd Sulaiman and Effendy Othman, in the informative company law textbook; *Malaysian Company Law: Principles and Practices,* 3rd edn, at p. 1075 explained clearly as follows:

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The underlying philosophy behind a statutory compromise or arrangement is to encourage companies facing financial difficulties to engage with their creditors with the objective of reaching an understanding on the settlement of the payment obligations to their creditors in order to assist the company with its financial recovery instead of going down the route of liquidation.

**[42]** As narrated earlier the RO was granted by the HC and the same was granted pursuant to s. 368 of the CA that states as follows:

Power of Court to restrain proceedings

(1) If no order has been made or resolution passed for the winding up of a company and a compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or any member or creditor of the company, restrain further proceedings in any action or proceeding against the company except by leave of the Court and subject to any terms as the Court may impose.

(2) The Court may grant a restraining order under subsection (1) to a company for a period of not more than three months and the Court may on the application of the company, extend this period for not more than nine months if:

(a) the Court is satisfied that there is a proposal for a scheme of compromise or arrangement between the company and its creditors or any class of creditors representing at least one-half in value of all the creditors;

(b) the Court is satisfied that the restraining order is necessary to enable the company and its creditors to formalise the scheme of compromise or arrangement for the approval of the creditors or members under section 366;

(c) a statement of particulars as to the affairs of the company made up to a date not more than three days before the application is lodged together with the application; and

(d) the Court approves the person nominated by a majority of the creditors in the application by the company under subsection (1) to act as a director or if that person is not already a director, appoints that person to act as a director notwithstanding the provisions of this Act or the constitution of the company.

(3) The person approved or appointed by the Court to act as a director of the company under paragraph (2)(d) shall:

(a) have the right of access to the accounting and other records including registers of the company at all reasonable times; and

(b) be entitled to require from any officer of the company any information and explanation as he may require for the purposes of his duty.

(4) Unless the Court otherwise orders, any disposition of the property of the company including things in action and any acquisition of property by the company, other than in the ordinary course of business, made after the grant of the restraining order by the Court shall be void.

(5) Where an order is made under subsection (1), every company in relation to which the order is made shall, within seven days:

(a) lodge an office copy of the order with the Registrar; and

(b) publish a notice of the order in one widely circulated newspaper in Malaysia in the national language and one widely circulated newspaper in Malaysia in the English language, and the company and every officer who contravene this section commit an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit and in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.

(6) An order made by the Court under subsection (1) shall not have the effect of restraining:

(a) further proceedings in any action or proceeding that should be taken against the company by the Registrar or the Securities Commission; or

(b) further proceedings in any action or proceeding against any person including the guarantor of the company but does not include the company that had applied for the restraining order.

(7) If a company disposes or acquires any property other than in the ordinary course of its business, without leave of the Court, the company and every officer who contravene this section commit an offence and shall, on conviction, be liable to imprisonment for a term not less than five years or to a fine not exceeding three million ringgit or to both.

**[43]** While in the meeting held for the scheme creditors, more than sufficient support had been obtained from the scheme creditors for the scheme of arrangement. This is because s. 366(3)(d) of the CA as narrated earlier only requires 75% in value of the scheme creditors to agree to the scheme of arrangement.

**[44]** However, it must always be borne in mind, in this case just because the scheme of arrangement was agreed by 90.4% of the scheme creditors in value, that alone is no reason for the HC to give its sanction. Even MRSB appreciated this. This is shown at p. 22 of its written submission where it acknowledged and admitted that the court will act as a final safeguard in respect of the approval for the scheme of arrangement.

**[45]** There are several issues as indicated below that would be relevant in the determination of the present appeals. A

*Whether The Composition Of The Scheme Creditors Is Unfair*

**[46]** In this regard, first it is most important to note who are named as the scheme creditors entitled to vote to agree and support the scheme of arrangement. This is because if the scheme creditors are related or mostly related to MRSB, it would be much easier to get the 75% in value of the scheme creditors approval for the scheme of arrangement. In fact, 90.4% of the scheme creditors in value in the meeting on 13 January 2021 agreed on the scheme of arrangement. B C

**[47]** The learned HCJ is also correct in finding that on this issue, what is of importance is to ensure that those who attended the meeting were a fair representative of the class of creditors.

**[48]** The scheme creditors, as stated comprised two groups. These are the third-party creditors on one side and HGS creditors, on the other. There were 636 third-party creditors with the value of only RM98,104,585.17. While there were only 19 HGS creditors but with the combined value of RM276,084,693.78. The total of the two is RM374,189,278.95. Thus, as seen, the HGS creditors are the dominant group. However, HGS creditors are all related to MRSB. This is because in the explanatory statement, HGS Creditors comprised of: D E

(i) ultimate holding company of MRSB;

(ii) holding company of MRSB;

(iii) subsidiaries of MRSB; F

(iv) directors of MRSB;

(v) related parties with common directors of MRSB.

**[49]** While the third-party creditors are not related to MRSB as HGS creditors are. Third-party creditors have a disparate and distinct interests from HGS creditors. Third-party creditors will obviously be keen to safeguard their interests including preserving their rights to recover maximum debts owed to them by MRSB compared to HGS creditors. G

**[50]** HGS creditors in turn would obviously be in favour of the scheme of arrangement for MRSB as they are indeed related to the latter as seen above. HGS creditors also outnumbered the third-party creditors who because of their relative number to the former, obviously would not be able to cogently challenge the HGS creditors, even if they (third-party creditors) teamed up to do so. HGS creditors, because of their sheer number, would therefore effectively and decisively be in a position to vote in favour of the scheme of H I

arrangement. No meaningful and worthy attempt could be mounted to defeat the HGS creditors' wish for the scheme of arrangement even if others, especially the third-party creditors might disagree with the same.

**[51]** There is little or no doubt at all that the composition of this class of creditors, comprising the third-party creditors and the HGS creditors to constitute a single class of the scheme creditors is unfair, uneven and downright lopsided. They should not have been lumped together in a single group. The total debt value of HGS creditors attending the meeting was 88% of the total value of the scheme creditors. But the total debt value of the third-party creditors attending the same meeting was only 12%. Metaphorically, the latter would have been eaten alive by the former.

**[52]** In this regard, in deciding whether a court should sanction a scheme of arrangement, it is apt that the learned HCJ referred to the Hong Kong case of *Re UDL Holdings Limited* [2002] 1 HKC 172, where Lord Millett, sitting as a judge of the Court of Final Appeal in Hong Kong, gave an overview of the court's approach as follows:

> (1) It is the responsibility of the company putting forward the Scheme to decide whether to summon a single meeting or more than one meeting. If the meeting or meetings are improperly constituted, objection should be taken on the application for sanction and the company bears the risk that the application will be dismissed.
>
> (2) *Persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common interest must be given separate meetings. Persons whose rights are sufficiently similar that they can consult together with a view to their common interest should be summoned to a single meeting.*
>
> (3) The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings.
>
> (4) The question is whether the rights which are to be released or varied under the Scheme or the new rights which the Scheme gives in their place are so different that the Scheme must be treated as a compromise or arrangement with more than one class.
>
> (5) *The Court has no jurisdiction to sanction a Scheme which does not have the approval of the requisite majority of creditors voting at meetings properly constituted in accordance with these principles. Even if it has jurisdiction to sanction a Scheme, however, the Court is not bound to do so.*
>
> (6) *The Court will decline to sanction a Scheme unless it is satisfied, not only that the meetings were properly constituted and that the proposals were approved by the requisite majorities, but that the result of each meeting fairly reflected*

> *the views of the creditors concerned. To this end it may discount or disregard altogether the votes of those who, though entitled to vote at a meeting as a member of the class concerned, have such personal or special interests in supporting the proposals that their views cannot be regarded as fairly representative of the class in question.* (emphasis added)

**[53]** The learned HCJ also correctly found the composition of the scheme creditors cannot be regarded as fairly representative of the class in question by referring to what is said by the Singapore Court of Appeal in *The Royal Bank of Scotland NV v. TT International Ltd* [2021] 2 SLR 213 as follows:

> [155] Taken together the authorities say with one voice that it is the norm for the votes of related party creditors to be discounted in light of their special interests to support a proposed scheme by virtue of their relationship to the company.

**[54]** In fact, the Singapore Court of Appeal in this case went on to say that the votes of wholly-owned subsidiaries companies for the scheme of arrangement, should be totally discounted. It is said as follows:

> [158] In our view, the votes of wholly-owned subsidiaries should be discounted to zero. Wholly-owned subsidiaries are entirely controlled by their parent company, *ie*, the Respondent in this case. Indeed, we view the Respondent's wholly-owned subsidiaries as extensions of the Respondent itself.

*Whether There Was Non-disclosure*

**[55]** The learned HCJ also correctly referred to s. 369(1)(a) of the CA that states as follows:

> (1) If a meeting is summoned under this Subdivision, every notice summoning the meeting:
>
> (a) which is sent to a creditor or member shall be accompanied with a statement explaining the effect of the compromise or arrangement and in particular stating any material interests of the directors, whether as directors or as members or as creditors of the company or otherwise, and the effect of the compromise or arrangement so far as it is different from the effect on the similar interests of other persons;

**[56]** In view of the statutory provision above, the learned HCJ was not in error to require that the appellant, MRSB must make a clear explanation to the third-party creditors about the full effect of the arrangement. Explanation must also be given to show the difference in effect to the third-party creditors as against other creditors.

**[57]** In this regard, it is the finding of fact of the learned HCJ, which we should not disturb, that there was insufficient explanation proffered by the appellant. The learned HCJ found this lacking in the application for sanction

(encl. 55), explanatory statement, Chairman's minutes and the Scrutineers' report. Thus, it could not be plainly wrong for the learned HCJ to find that MRSB had not been transparent about the circumstances giving rise to the related party debts.

**[58]** There was no indication when these debts were incurred by the HGS creditors and the circumstances upon which those debts were incurred. There was thus material non-disclosure of the information needed.

*Is The Scheme Of Arrangement Reasonable?*

**[59]** The scheme of arrangement requires RM167.4 million of debts to the scheme creditors by MRSB to be waived. However, there was no indication in the books of MRSB how this large amount was derived at. The scheme also requires that MRSB shall be irrevocably, permanently, unconditionally, completely and absolutely released and discharged from all claims and liabilities to all the scheme creditors. The third-party creditors including the respondent will be left in a bind if the proposals above are accepted. They could no longer claim their money in full from MRSB.

**[60]** Further, the scheme of arrangement provides for undertaking by MRSB to inject assets of RM64.2 million. However, there is no explanation how this huge amount would be raised. Even if MRSB's assets could be sold for this purpose, it could not be denied that the prevailing tumultuous market condition makes it uncertain that a favourable sale of these assets could be achieved.

**[61]** In addition, the earmarked properties worth RM142.2 million which are part of elements mall are also an important aspect of the scheme of arrangement. The explanatory statement for the scheme of arrangement also notes the need for the sale of these earmarked properties. However, it is stated, barring unforeseen circumstances, the sale might only happen between three to five years. It also states the sale of these properties depends on market conditions. Thus, the uncertainty of the sale is also a justified concern for the third-party creditors including the respondent.

**[62]** The earmarked properties are also charged to a foreign entity *ie*, Haitong International Financial Products (Singapore) Pte Ltd. Settlement must be made with this foreign entity before the earmarked properties could be released to RSB being the SPV. Until that settlement, the earmarked properties cannot be released to the SPV. This is also another reason to say the arrangement is rigged with uncertainties.

**[63]** All of the above regarding this issue of whether the scheme of arrangement is unreasonable are finding of fact made by the learned HCJ. The finding of fact was made after considering the evidence before the HC. On top of that, the learned HCJ also found the total liabilities of MRSB had exceeded its total assets.

**[64]** Based on all the explanation above, there is no reason for us to disagree with the finding of fact made by the learned HCJ that the sanction for the scheme of arrangement should not be given as the same is unreasonable, unfair and not equitable. As indicated by the Court of Appeal case of *Dr Jayadevan Arayan & Anor v. Sharon Simon & Ors* [2000] 3 CLJ 647; [2000] 3 MLJ 657, the appellate court should be slow in disturbing the finding of fact made by the lower court.

**[65]** In this regard, we should also be reminded of the Federal Court case of *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1 where it is said as follows:

> As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

*Ensuing Order*

**[66]** As the learned HCJ did not err in refusing the sanction, there is also no reason to disturb the HC's decision in disallowing the application to extend the RO. The latter must be contingent on the former. As the application for sanction is rightly dismissed, the RO cannot be sustained and be allowed to continue. Likewise, there is absolutely no reason for the learned HCJ to allow the application to intervene by RSB as the SPV, once the application for sanction and approval of the scheme of arrangement is dismissed. Besides, looking at the scheme of arrangement as a whole, the role of RSB as the SPV itself as explained in this judgment is questionable.

## Conclusion

**[67]** The scheme of arrangement proposes huge MRSB's debts to be largely written off with little benefit to the stakeholders, especially the third-party creditors. The latter also had been classified as the scheme creditors unfairly with almost negligible say on the viability of the scheme of arrangement.

**[68]** The scheme of arrangement also does not seem to be workable because of the uncertainties highlighted. Further, there is no reason to allow a company like MRSB that is saddled with enormous debts to continue operating without a clear strategy to effectively manage its serious difficulties. In the circumstances, we find that it will only invite further woes to sanction the scheme of arrangement. In this regard, the words of the sage in the preface to this judgement come to mind. In any event, the scheme is undoubtedly unfair to its creditors, including the respondent.

**[69]** Based on all the reasons explained, we are unanimous in affirming the HC's decisions in respect of the applications and in dismissing the related appeals with costs to the respondent, subject to allocator.